IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976.

No. 76-364

CHARLES EDWARD WOODRUFF, JAMES GILHOOLEY, EAST BAY MODEL ENGINEERS SOCIETY, INC.,

Petitioners,

vs.

AIR PROPERTIES G. INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners Charles Edward Woodruff, James Gilhooley, East Bay Model Engineers Society, Inc., respectfully pray that a Writ of Certiorari issue to review the dismissal by the United States Court of Appeals for the Ninth Circuit of the appeal from the district court's reclassification of petitioners' class action.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A. The Opinion was reported in summarized form in CCH Fed. Sec. L. Rep. ¶95,657.

JURSIDICTION

The Opinion in the Court of Appeals was filed July 6, 1976. A petition for rehearing in banc was filed on July 20, 1976, and such was denied by order filed August 11, 1976. See Appendices B and C. A motion for an order staying the issuance of mandate was filed on August 18, 1976, and an order staying such issuance until September 10, 1976, was filed on August 19, 1976. See Appendices D and E.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. Whether, in determining the "death knell" appealibility of a denial of class status, the court may look only to named, active class members to determine if any has the requisite financial interest at stake to maintain an individual action in federal court; and, if it may look to unnamed, inactive class members, whether it must further determine with realistic cognizable probibility that such an inactive member will prosecute his individual action to final judgment.

B. Since the right to maintain a class action lawsuit is a right protected under the collateral order doctrine, should the appealibility of a denial of the certification of a class in an action brought under the Federal Securities Laws

really be evaluated under the "collateral order" doctrine enunciated in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and followed in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), or the "death knell" doctrine delineated in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967), and adopted by the Ninth Circuit. Blackie v. Barrack, 524 F.2d 891, 896 (9th Cir. 1975); Falk v. Dempsey-Tegeler & Co., Inc., 472 F.2d 142 (9th Cir. 1972); and Weingartner v. Union Oil Company of California, 431 F.2d 26 (9th Cir. 1970), cert. denied, 400 U.S. 1000, 91 S.Ct. 459, 27 L.Ed.2d 451 (1971).

STATEMENT OF THE CASE

On September 30, 1971, the plaintiffs-petitioners commenced an action based upon alleged violations of the Federal Securities Laws, as well as other federal and state statutes, in the sale of certain real property in Paso Robles, California. See Appendix A, incorporated herein by reference. The pertinent details are set forth in pages 2 and 3 of the Court's Opinion below.

On May 17, 1972, the district court, per Judge Lydick, conditionally granted plaintiffs' motion to maintain the action as a class action including within the class approximately 300 investors.

The total amount of investment in this case was about $3,406,000, 40% of which represented the actual initial cash purchase price. This averages to a claim of approximately $4,600 per investor. See page 7 of Appendix B.

On August 20, 1974, the trial court

withdrew certification of the class status, and plaintiffs-petitioners appealed that decision pursuant to 28 U.S.C. §1291. The Court of Appeals dismissed the appeal for lack of jurisdiction on July 6, 1976. Appendix A.

GRANTING A WRIT OF CERTIORARI IS APPROPRIATE IN THIS CASE

Not only does there appear to be a confusion of no minor significance among the circuits with regard to the legal criteria for evaluating the finality of an order denying class certification, but their various modes of disposition of orders of this nature under 28 U.S.C. §1291 make it readily apparent that this Court should definitively set forth the parameters governing the issue of appealibility in those cases such as this one, where most members of a class are in fact effectively precluded from pursuing their cause of action on an individual basis.

Specifically, the Third, Sixth, Seventh, and Tenth Circuits have apparently determined that under no condition will an appeal lie from the denial of class certification (Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969); Thill Securities Corp. v. NYSE, 469 F.2d 14 (7th Cir. 1972); King v. Kansas City Southern Industries, Inc., 479 F.2d 1259 (7th Cir. 1973); Gerstle v. Continental Airlines, 466 F.2d 1374 (10th Cir. 1972); and Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir. 1975)) while the Second, Fifth, and Ninth Circuits have concluded (with no real elucidation on the parameters of appealibility) that appeals will be permitted

based on a case-by-case evaluation of the dollar amounts of the claims of the plaintiffs (Eisen v. Carlisle & Jacquelin, supra; Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971); Graci v. United States, 472 F.2d 124 (5th Cir. 1973), cert. denied, 412 U.S. 928, 93 S.Ct. 2752, 37 L.Ed.2d 155 (1973); Gosa v. Securities Investment Co., 449 F.2d 1330 (5th Cir. 1971); Falk v. Dempsey-Tegeler & Co., supra; and Weingartner v. Union Oil Co., supra.

ARGUMENT

1.

The Court below failed to ascertain the existence of a cognizable probability that any class member could or would maintain an individual action resulting in an eventual final judgment.

The court of appeals below essentially held that no appeal of the denial of a class certification will be permitted until there is a "final" judgment in some untold future litigation pursued by a single claimant or a group of two or more class members. See pages 6 and 7 of the Opinion below, Appendix A. If such a holding was predicated upon either a finding of a cognizable probability or a representation from an active class litigant that such a future litigation would, in fact, be pursued, then the petitioners here would have no quarrel with the disposition below, because the timeliness of an effective appeal would then be assured.

However, the obvious flaw in such a strained and technical construction of the

"finality" doctrine is that the court of appeals assumed (without any reasonable basis for doing so) that some unknown passive member of the class would prosecute an individual action to judgment. See footnote 6 of the Opinion below.

The court of appeals below focused solely on the dollar amount of an individual claim as signifying whether or not the "death knell" has rung in a particular case. See pages 6 and 7 of the Opinion. Yet, upon reflection, it is readily apparent that an exclusive focus on the amounts of each claim alone really only pursues the analysis half-way; the holding below completely overlooked, or ignored, the realistic probabilities of such a "viable" claim being pursued to the all-important final judgment from which the appeal of the order below would ultimately be taken.

In order to be able to conclude that the appeal below was premature under 28 U.S.C. §1291, there must be some factual finding or at least some indicia, apart from a dollar amount, that there will even be a subsequent individual action. To hold an appeal to be premature under §1291 without establishing a cognizable probability that there will ever be an appeal at all is really to compound the inherent flaws in the overly technical, and inpractical, construction of the finality doctrine.

More specifically, the court below noted at page 7 of its opinion that one of the class members "actively engaged in this litigation" has a basic claim of $17,901. The only class members actively engaged in this litigation are the petitioners here, and not one of them has a claim for that amount. Petitioners submit that if the court below attributed to this unknown class member an (unknowable) inclination to proceed with an individual action, such was highly improper because: (1) there existed

no finding of facts from which the court below could have discerned such an implication; and, more important, (2) the previous "death knell" cases which have considered the viability of individual claims have consistently focused on the claims of named active plaintiffs for the simple reason that the named class plaintiffs have already demonstrated their willingness to pursue their claims, if possible. See, for instance, Eisen v. Carlisle & Jacquelin, supra; Korn v. Franchard Corp., supra; City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969); Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969); Falk v. Dempsey-Tegeler & Co., Inc., supra; Shayne v. Madison Square Garden Corporation, 491 F.2d 397 (2d Cir. 1974); and Gosa v. Securities Investment Company, supra.

Petitioners submit that, if the "death knell" doctrine were to be properly applied in light of the theoretical foundation of 28 U.S.C. §1291, the initial focus below should have been on the viability of the claims of the named, active plaintiffs. Should that evaluation clearly indicate that no named plaintiff has a claim which could realistically be pursued to judgment in an individual action, the trial court's order should be held as final, unless it is further determined, based on a realistic appraisal of the liklihood that at least one inactive, unnamed class member will in fact puruse his claim individually, that there is a cognizable probability that there will be a subsequent litigation from which an appeal of the disputed order may be taken. This the court below did not do.

The court below specifically pointed to this problem in footnote 6 of its Opinion, yet refused to confront the apparent

inconsistency in its disposition of the matter. A subsequent litigation by the unnamed, inactive class member simply cannot be assumed, because to do so is to ignore the possible legal consequences to the class should that inactive class member fail to pursue his or her claim. If months or years go by with no prosecution, the injustice to the other class members would become more evident.

Since, in that case, one would never really know precisely when the order could be deemed "final", problems would be encountered not only with the time limits for any subsequent appeal, but also with any applicable statute of limitations should no one proceed at all. A defendant might also move to dismiss the entire action for failure to prosecute; of course, if no one in the class indicates any willingness or capability to proceed, such a motion could not realistically be opposed and the entire class would, in all probability, have finally obtained the "final" judgment in a manner not really foreseen, or demanded, by the "final judgment" doctrine.

As succinctly stated by the Ninth Circuit in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975),

> "The requirement [of the finality doctrine] saves judicial time by eliminating review of rulings adverse to an eventually successful litigant." 524 F.2d at page 895; emphasis added.

Petitioners submit that, absent the opportunity for immediate review of the order withdrawing class certification, there is little or no liklihood of individual success in this complex securities litigation. On this point, it should be

pointed out that this case was, and is, on a contingent fee basis. See Appendix B, page 4, and Hackett v. General Host Corp., 455 F.2d 618, 623 (3rd Cir. 1972), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972), cited in footnote 1 of the Opinion below.

The final injustice resulting to the class members from the decision below is the very real possibility that the multi--million dollar lawsuit brought by the class can be destroyed by the defendants by merely paying off the $17,901 claim held by the unnamed inactive party which the court held as falling "in the clearly viable range." Page 7 of the Opinion below. Indeed the court below acknowledged this injustice in footnote 6 of its Opinion, but declined to do anything about it:

> "Whether the refusal by a class member having a viable individual claim to pursue his individual remedy or the relinquishment of his claim, as a result of a settlement or otherwise, constitutes a basis to justify a reexamination of the issue of appealability of a denial of class certification is not before us and we express no opinion thereon."

The Court below failed to adequately elucidate whether or not its dismissal of the appeal was based on the "death knell" doctrine or the collateral order doctrine.

The court below seemed to focus on

the "death knell" doctrine exclusively and, for some unexplained reason, it failed to consider the appealability of the class status order under the collateral order doctrine. Such a failure presents two significant problems:

(1) It causes great confusion in that although the court below acknowledged at page 3 of its opinion that the "death knell" doctrine sprang from the collateral order doctrine and that both doctrines "are applicable to a denial of class status," it apparently was so preoccupied with its narrow application of the "death knell" doctrine (which is discussed supra) that it completely failed to analyze the appealability question in terms of the collateral order doctrine; and

(2) An injustice has been committed against the petitioners because as a result of the above-described failure to apply the collateral order doctrine, their right to maintain a class action lawsuit, which clearly is a collateral right protected under the collateral order doctrine, has been effectively destroyed by the trial court and no appeal has been allowed.

It must be kept in mind that there are two rights at stake here. One right, the right to bring a lawsuit under the federal securities laws, was analyzed by the court below under the "death knell" doctrine and the court determined that that right had not been destroyed by the order decertifying the class. However, the court below failed to consider the other right, a collateral right: the right to maintain a class action lawsuit. In the words of Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528

(1949) this second right is

> "separable from, and collateral to, rights asserted in the action, [and] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Although the court concluded that the first right was not destroyed, it ignored the undeniable fact that the second right has been destroyed and it is the destruction of this collateral right that should bring into operation the collateral order doctrine. The doctrine was not brought into operation in this case.

This failure by the court below is particularly ironic because the court below expressly stated that the determination of class status is collateral to the merits of the case. See the opinion below at page 8. The court apparently tried to avoid the operation of the collateral order doctrine by noting at page 8 that the trial court's order decertifying the class also turned on a preliminary determination of the merits --- in this case, the issue on the merits was defendants' duty under Rule 10.b-5 and the Federal Securities laws.

However, if this is the proper test for distinguishing class status orders in securities cases from a pure collateral order, than petitioners submit that the order below can only be seen as a decision on the merits (that is, was there reliance by members of the class and what kind), and therefore, the decision was final. To conclude, as the court did below, that "but for decision on the merits, this order

would be collateral" is to judge the case on the merits.

However, petitioners are not arguing at this point whether the decision below should have turned upon the merits of the Rule 10b-5 cause of action. What petitioners do submit is that the collateral order doctrine as articulated in Cohen, supra, and Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) should have applied in this case and it was not. This Court should grant a writ of certiorari to resolve this confusion and to preclude the injustice that has been committed against the class members herein.

CONCLUSION

Petitioners submit that the order denying class status means an effective end to their ability to proceed with their claims, and is a true "death knell".

It is further submitted that if, in fact, other unnamed, inactive class members may be looked to in order to determine if any has the requisite financial interest to sustain an individual action, that the district court must further determine, with some degree of realistic, cognizable probability that such a member will in fact proceed to the critical final judgment in an individual action.

Finally, it is submitted that the court below failed to apply the collateral order doctrine to the trial court's class status order and that such failure contradicts the underpinnings of the doctrine.

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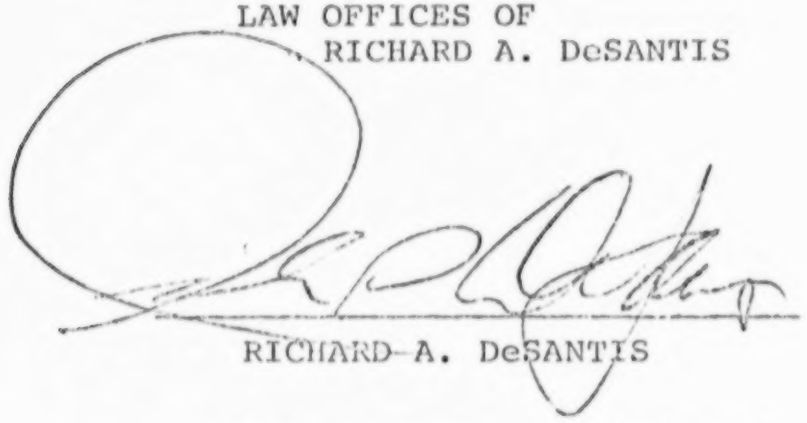
For the foregoing reasons, this Court should grant a writ of certiorari to remedy this confusing contradiction.

Dated: September 9, 1976.

Respectfully submitted,

LAW OFFICES OF
RICHARD A. DeSANTIS



RICHARD A. DeSANTIS

Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD HUDSON SHARE, CHARLES EDWARD WOODRUFF, JAMES GILHOOLEY, EAST BAY MODEL ENGINEERS SOCIETY, INC.,
Plaintiffs-Appellants,

vs.

AIR PROPERTIES G. INC., THE HONG KONG BANK OF CALIFORNIA, REPUBLIC NATIONAL BANK AND TRUST COMPANY, a National Banking Institution, LAND DATA RESEARCH COMPANY, RONALD W. CURRAN, BYRON H. CUNNINGHAM, MARTIN ACKERMAN, C. N. HISLOP, JR., FIRST AMERICAN TITLE INSURANCE COMPANY, LAND DATA INVESTMENTS, INC., GARY MARTIN, ADAMS PROPERTIES, INC., WELLWOOD BEALE, AIR FARMS NW 80 LTD., SAVERS EQUITY FUNDING CORPORATION, JOEL BERGER, PRO LAND DATA ASSOCIATES, SANT PALLAN, WILLIAM L. PEREIRA & ASSOCIATES, RAWLS ACKER, DON O'BRIEN,
Defendants-Appellees.

No. 74-3282

OPINION

[July 6, 1976]

Appeal from the United States District Court
for the Central District of California

Before: GOODWIN and SNEED, Circuit Judges,
and EAST,* District Judge.

SNEED, Circuit Judge:

This case comes before us as an appeal from an order of the district court revoking its tentative class certification. The under-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

AA

lying action is brought by investors in a land development project for violations of various securities and related statutes. Appellants claim jurisdiction for this review under 28 U.S.C. § 1291. There is no jurisdiction to review and therefore we dismiss the appeal.

I. *The Facts.*

Plaintiffs-appellants are investors who acquired undivided interests in parcels of real property which were to be developed into an "Airpark" in the vicinity of Paso Robles Airport. The defendants are the individuals and corporations promoting or otherwise involved with the "Airpark" project. Investors paid 40% of the purchase price of their undivided shares as a cash down payment. A promissory note and deed of trust were executed for the balance. The notes were at the rate of 8% per annum. For the first five years repayment was to be monthly and was to include only interest. For the next ten years monthly payments were to include both principal and interest. The total purchase price paid was about $3,406,000. The deeds of trust securing the balance owed by the investors were subordinate to the deeds of trust executed between the promoters and the original holders of the real estate.

In order to market the undivided interests the promoters made representations in a number of publications concerning the project. In September 1971 defendant Curran, who was apparently the chief promoter of the project, admitted his insolvency. The project appears to have collapsed at that point. On September 30, 1971, plaintiffs commenced this action based upon alleged violations of section 5 of the Securities Act of 1933, 15 U.S.C. § 77e (failure to comply with registration and prospectus requirement), section 10b of the Securities Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder. In addition, plaintiffs allege counts under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1703, 1705, 1707, the California Corporate Securities Act, Cal. Corp. C. § 25,500 et seq., the California Real Estate Act, Cal. Bus. & Prof. C. § 11,000 et seq., the California Subdivision Map Act, Cal. Bus. & Prof. C. § 11,535, and counts of common law fraud and conspiracy to defraud.

On May 17, 1972, the district court conditionally granted plaintiffs' motion to maintain the action as a class action. There were

some 300 investors who were potential class members. The district court issued an order denying class action status on August 20, 1974. It is this order which is on appeal here.

II. *The Issue.*

The question we face is whether the denial of class status in the circumstances of this case may be the basis of an immediate appeal as of right. The parties, following the recent case law, have centered their argument around the so-called "death knell" doctrine of the Second Circuit and, in particular, around the notion of the viability of the named plaintiffs' individual causes of action. *See, e.g., Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971). We believe that this focus is too narrow. Both the "death knell" doctrine and its ancestor, the collateral order doctrine, are applicable to a denial of class status. Moreover, it is our view that the theoretical bases for collateral order and "death knell" appeals have not been properly articulated and are often confused. Hence, we first will set forth our understanding of the "death knell" and "collateral order" doctrines before applying them to the facts of this case.

III. *The "Death Knell."*

The confusion began, albeit unrecognized, when the "death knell" doctrine was first enunciated. *See Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (*Eisen I*). The Second Circuit framed the issue in *Eisen I* as the question of whether the facts there fell within the collateral order doctrine. *Id.* at 120. Next the court invoked *Gillespie v. United States*, 379 U.S. 148 (1964) for the proposition that finality is to be given a "practical rather than a technical construction." That court concluded that an appeal would lie in a case where denying an appeal would mean the end of the lawsuit "for all practical purposes." *Eisen I* at 120. The structure of the argument in *Eisen I* made the "death knell" rule appear to be merely a special case of the collateral order doctrine. Some courts continue to discuss the two as if they were interchangeable. *See, e.g., City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2nd Cir. 1969). Other courts have rejected the "death knell" approach without articulating a

distinction between the two rules.[1] It is our view that the collateral order doctrine and the death knell rule represent two distinct but compatible tests for appealability.[2]

The collateral order doctrine provides appellate jurisdiction with respect to asserted rights which do not constitute an ingredient of the basic cause of action and which will be lost forever if the disposition of the trial court is not reviewed on appeal prior to the adjudication of the basic cause. The death knell doctrine, on the other hand, is concerned with survival of the basic cause of action, not merely a right collateral thereto, and is grounded on the notion that a sentence of death should not be passed on a cause of action by only one judge. Its founda-

[1]The leading case rejecting the death knell doctrine is Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972). *See also,* King v. Kansas City Southern Industries, Inc., 479 F.2d 1259 (7th Cir. 1973); Gerstle v. Continental Airlines, Inc., 466 F.2d 1374 (10th Cir. 1972). *Hackett* correctly states that the "death knell" rule "will operate primarily if not exclusively in that class of cases in which attorneys are willing to undertake on a contingent fee basis class actions for the recovery of money damages for claimed violations of federal regulatory statutes. These are chiefly the federal antitrust and securities statutes." *Id.* at 623. The *Hackett* court goes on to say that the primary justification for the "death knell" rule is that, by being hospitable to the purported class, it tends "to reinforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or single-party private enforcement." We disagree. As we state in text, *infra,* the reasons for allowing review in such cases are very much closer to the core of the federal judicial system than any fashionable notion about the usefulness of the class action as a social weapon. It is our view that to deny review in such cases removes from plaintiff his day in court on the merits with too high a probability of error. Nor does certification under 28 U.S.C. § 1292(b) or mandamus solve the problem, as *Hackett* suggests. The very error with which we are concerned is that of the district judge, and it is precisely in those cases where he fails to certify under § 1292(b) where the harm will be manifest. For those cases in which there has been error and no section 1292(b) certification, mandamus, as traditionally formulated, imposes too high a standard to give adequate protection to plaintiffs.

[2]We feel that our view was foreshadowed by Weingartner v. Union Oil, 431 F.2d 26 (9th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971), the first case in this Circuit dealing with the death knell. In that case the collateral order rule *or* the likelihood of irreparable harm to a party were considered alternative justifications for immediate review. *Id.* at 29.

tion is that each litigant deserves not only his day in district court but also his day on appeal. Congress set up the federal judiciary so that litigants are allowed at least "two bites at the apple" before they are foreclosed on the merits—one before a trial court and another before a court of appeals. Presumably this was felt to be the proper balance between achieving finality on the one hand and reducing the probability of error in the individual case on the other. We see no reason why the balance should be differently drawn in the case of a class certification where the individual claims are not viable. This is so even though by the usual criteria the order may be otherwise inappropriate for review. Nonetheless, it is our view that justice demands that we compromise our usual notions of appropriateness for review to avoid the execution of a cause of action on the basis of a decision of a single district judge.[3]

Our compromise should be no broader than necessary to serve its purpose. Thus, we believe that courts must be strict in making the plaintiff demonstrate that the order complained of truly means the death of his action. We agree with the Fifth Circuit that the size of the individual claims, the extent of plaintiffs' resources, and the probable expense of prosecuting the lawsuit

[3]Our view does not conflict with the result in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975). *Blackie* rejected the reverse death knell doctrine in this Circuit. *Id.* at 895-900. We agree. The irreparable harm which justifies the death knell doctrine is the possibility of foreclosing a plaintiff without review. This is a concern which is an integral part of the congressional scheme for the federal judicial system. A grant of class certification does not threaten that harm, but only a loss of money. Thus the death knell doctrine does not apply, but this does not mean that a class certification might not in some cases qualify for appeal under the collateral order doctrine. This was not the case in *Blackie* since the question of certification went to the merits of the case.

We reject the three-pronged test, which appears to be the latest formula of the Second Circuit for solving these problems. *See, e.g.,* Parkinson v. April Industries, 520 F.2d 650 (2nd Cir. 1975). The test requires that: (1) the class action determination be "fundamental to the further conduct of the case"; (2) review of the order be "separable from the merits"; (3) the order cause irreparable harm including the time and money spent in defending a huge class action. Loss of litigation expenses does not qualify a case for death knell treatment. Nor should there be a requirement that an order be "fundamental," in the sense of being essential to the survival of the action, in order to qualify as a collateral order.

are all factors relevant to the issue of viability. *Graci v. United States,* 472 F.2d 124 (5th Cir.), *cert. denied,* 412 U.S. 928 (1973). We also agree that in those cases where the amount in controversy leaves the question of viability in doubt, the plaintiff bears the burden of showing that death to the action would result from the failure to certify the class. *Gosa v. Securities Investment Co.,* 449 F.2d 1330 (5th Cir. 1971).

There has been confusion over the proper measure of the amount in controversy for the purpose of determining the viability of the action. Plaintiffs here have argued that the proper measure is the "average" claim, the "typical" claim,[4] or the claims of the representative plaintiffs. This is incorrect. If *any* member[5] of the purported class proceeds in an individual action, the class certification can be challenged on appeal by other members of the class, named or unnamed. *See Monarch Asphalt Sales Co. v. Wilshire Oil Co.,* 511 F.2d 1073 (10th Cir. 1975).

Therefore we hold that, if, after appropriate proceedings and findings with respect to whether any member of the purported class possesses a cause of action which is viable if brought individually, it appears such a member exists, an order of the trial court denying class certification does not constitute an appealable order.[6] It is simply not true, as plaintiffs here claim, that

[4]We find no need to characterize plaintiffs' argument in the more precise language of mean, median, and mode. As the ensuing text makes clear, each of these measures is conceptually incorrect in this context.

[5]It is also true, of course, that if any group of two or more class members go forward the right of appeal is preserved. In certain circumstances it might be appropriate to determine viability by aggregating the claims of a group of class members. *See* Weingartner v. Union Oil Co., 431 F.2d 26, 29 (9th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971). We have no occasion in the context of this case to decide this point. *See* note 8, *infra.*

[6]We reject the argument that so long as any individual claim is not viable the death knell has rung. *See* City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 301 (2nd Cir. 1969) (Hays, J., dissenting). So long as the issue of the refusal of certification may be challenged on appeal the rights of all small claimants are protected to the same extent they would be in any other action. Whether the refusal by a class member having a viable individual claim to pursue his individual remedy or the relinquishment of his claim, as a result of a settlement or otherwise, constitutes a basis to justify a reexamination of the issue of appealability of a denial of class certification is not before us and we express no opinion thereon.

the successful plaintiff in an individual action would have no incentive to challenge a denial of class status. Presumably a reversal of the denial would lead to a greater recovery and hence lower the proportion of plaintiff's individual recovery going to his attorney. Such a challenge has in fact been mounted. *See Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

We believe the "death knell" has not rung in this action. The record reveals that among the class members actively engaged in this litigation there is one individual who purchased his undivided share for $44,752.50. Even if we accept the contention that the amount in controversy is only 40% of this[7]—the cash down payment—the claim is still for $17,901. This falls in the clearly viable range. *See Gosa v. Securities Investment Co., supra.*[8] These figures ignore, in addition to the amount of the note, any claim for interest paid on the notes or for punitive damages. Hence, even when an extremely conservative measure is used, this action is viable.[9] In addition, the record indicates there exist other purchasers of undivided interests having even larger claims.[10]

IV. *The Collateral Order Doctrine.*

Unlike the "death knell" doctrine the collateral order doctrine, properly understood, requires no compromise of the principles of appellate review. *See Cohen v. Beneficial Loans Corp.,* 337 U.S.

[7]There is a controversy between the parties over whether the amount in controversy is to be measured by the purchase price of the undivided interests in land which were sold or by the cash down payment only. We think that the full purchase price measures the amount in controversy. Plaintiffs not only paid cash down payments but also executed notes for the balance. Certainly rescission of those notes is an integral part of the relief they seek. Counts one and two of plaintiffs' Second Amended Complaint request such relief. However, we do not rely on this point in reaching our decision.

[8]The record also reveals two individuals who evidently purchased their shares jointly for a price of $67,128.75. Forty percent of this figure is $26,851.50. *See* n.5, *supra.*

[9]We in no way mean to indicate that such a conservative measure is the most appropriate one in every case. We use it only to underscore our result and to eliminate the necessity to devise a formula for the amount of a claim in a land sale case.

[10]These "other purchasers" are different from the two referred to in note 8, *supra.*

541 (1949). In fact the preconditions the doctrine requires define a type of final order precisely ripe for appellate review. In the words of *Cohen*, the collateral order doctrine grants review "in that small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. The essence of the doctrine is that there is no reason not to review since as to the aspect of the case in question the proceedings are final. In addition, there is a strong reason to grant review because at least one party will suffer irreparable harm if the order is erroneous.[11]

In a sense the determination of class status is collateral to the merits of the case. However, frequently the issues upon which class certification turns are not separable from the merits. The order of the trial court makes it clear that this is such a case. The trial court's order turned upon an application of the federal securities law of this circuit to the facts of the case. In particular, the denial turned on the application to this case of *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) and *White v. Abrams*, 495 F.2d 724 (9th Cir. 1974). The issue of defendant's duty is at the very heart of the merits of the action as well as being at the heart of the predominance question under Rule 23(b)(3).

Nonetheless, a denial of class certification, even though not a collateral order, under proper circumstances may constitute an appealable order under 28 U.S.C. § 1291. To the extent indicated herein we recognize the "death knell" doctrine in spite of its failure to fit neatly within the collateral order doctrine. In this case the requirements of the "death knell" doctrine were not met.

APPEAL DISMISSED.

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[11]Thus doctrinally the death knell and collateral order doctrines are distinct. They are related, however, in one functional sense. Both are concerned with the question of whether the issue upon which the contested order turns will be litigated again if review is not granted.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 7-12-76—400

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD HUDSON SHARE, ET AL.,

Petitioners-Appellants,

v.

AIR PROPERTIES G, INC., ET AL.,

Respondents-Appellees

NO. 74-3192

PETITION FOR REHEARING AND SUGGESTION THAT REHEARING BE IN BANC

TO THE HONORABLE JOSEPH T. SNEED, CIRCUIT JUDGE,
THE HONORABLE ALFRED T. GOODWIN, CIRCUIT JUDGE, and
THE HONORABLE WILLIAM G. EAST, U. S. DISTRICT JUDGE

Appellants petition for a rehearing in banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Rule 12 of the Rules of the Ninth Circuit in order to reconsider the judgment entered in this action.

I. GROUNDS

This petition is based on the following grounds:

1. In the opinion of petitioners, this Court has clearly misapprehended the practical significance of the crucial facts relating to the amounts of individual claims.

2. In the opinion of petitioners, this Court's Opinion of July 6, 1976, suffers from a lack of clarity as to whether or not the existence of a contingent fee arrangement will necessitate the application of the "death knell" doctrine in the present circumstances.

3. In the opinion of petitioners, and in light of

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this Court's policy of not encouraging a single panel to subsequently overrule an earlier decision even when faced with crucial variations on earlier factual assumptions, the applicability of the "death knell" doctrine under the present circumstances represents an issue of such public importance that it should be definitively decided by the full Court.

II. ARGUMENTS

Petitioner believes these points are substantial for the following reasons:

A. MISAPPREHENSION OF THE PRACTICAL SIGNIFICANCE OF THE CRUCIAL FACTS

This Court's decision of July 6 held that the "death knell" doctrine would not apply if even one class member could proceed in an individual action.[1/] Yet such a narrow doctrine collides significantly with the rule that

> "[T]he requirement of finality is to be given a 'practical rather than a technical construction'." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171, 94 S.Ct. 2140, 40 L.Ed.2d 732, 745 (1974), quoting from Cohen v. Beneficial Loan Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); emphasis added.

More pointedly, in this Court's Opinion, it is stated at pages 6-7 that

> "If any member of the purported class proceeds in an individual action, the class certification can be challenged on appeal by other members of the class, named or unnamed," (emphasis is the Court's).

Footnote 5, page 6, reiterates that

> "It is also true, of course, that if any group of two or more class members go forward the right of appeal is preserved,"

while footnote 6, page 7, states that

> "So long as the issue of the refusal of certification may be challenged on appeal the rights of all small claimants are protected to the same extent they would be in any other action."

Yet the Court, after focusing attention on a major problem area in the above three instances, failed to answer the crucial question which literally begged to be resolved

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1/ Court's Opinion, page 7: "Therefore we hold that, if, after appropriate proceedings and findings with respect to whether any member of the purported class possesses a cause of action which is viable if brought individually, it appears such a member exists, an order of the trial court denying class certification does not constitute an appealable order."
[It is to be noted that there were approximately 300 investors. Should less affluent purchasers be placed at the mercy of more affluent purchasers who could, but choose not to, pursue their cause of action?]

on the face of the Opinion: In the practical construction of the factual circumstances of this case, how may such small investors[2/] feasibly challenge the denial of class certification when they do not have the requisite financial means with which to proceed with individual actions?[3/]

Technically, the Court's determination that no small investor will be denied his "second bite at the apple"[4/] may be correct. But that is not the point: practically speaking, this Court must be aware of the legal realities of complex litigation (such as this case) when promulgating a rule which, for all practical purposes, will operate to preclude an effective appeal of the denial of the class certification for the small investors who must act as a class to have any effective access to the Courts. The great majority

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2/ The record on appeal clearly indicates that only 10% of the class of plaintiffs could meet the requisite amount in controversy based on the recovery of their cash down payment. [See pages 402-410 of the Clerk's Transcript]

3/ In this regard, the Court apparently overlooked the fact that this class action was, and is, undertaken on a contingent fee basis; see discussion, infra.

4/ See page 5 of this Court's opinion

of the class of plaintiffs in this case simply do not have the financial ability to engage in protracted individual actions. Form should rarely, if ever, prevail over substance in cases where such adherence would, in effect, yield the prospect of a right with no meaningful remedy.

There is scarcely room for doubt that the Supreme Court in Eisen, supra, and also Cohen, supra, indicated that they were fully prepared to disregard any such technicality restricting application of the final order doctrine in factual circumstances such as this case.

In sum, the small investors in this instance will realistically have lost forever their ability to proceed with a cause of action, and will also realistically be denied effective appeal if they are forced to wait until one of the class members proceeds with an individual action.[5/] Should an appeal be taken at that point and the trial court's decision reversed, there will have been an entire trial on the merits which will have been for naught. Such result cannot possibly be that envisioned under any concept of "finality."

B. LACK OF CLARITY

This Court states in its Opinion at page 4, footnote 1:

> "Hackett [v. General Host Corp., 455 F.2d 618, 623 (3d Cir. 1972), cert. denied, 407 U.S. 925, 92 S.Ct. 2460,

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5/ Which, as this Court recognized but failed to resolve, may never occur. See footnote 6, page 7, of the Opinion.

> 32 L.Ed.2d 812 (1972)] correctly states that the 'death knell' rule 'will operate primarily if not exclusively in that class of cases in which attorneys are willing to undertake on a contingent fee basis class actions for the recovery of money damages for claimed violations of federal regulatory statutes. These are chiefly the federal antitrust and securities statutes'," (emphasis added).

The record on appeal in this case shows that this litigation was, and still is, undertaken on a contingent fee basis by counsel for appellants. It is suggested that this is a crucial fact overlooked by this Court; if so, this Court's agreement with the above quotation seems to be prima facie support for application of the "death knell" doctrine in the instant case. The reasoning behind the statement above clearly indicates that such fee arrangements are indicative of the inability of small investors to proceed individually with the hope of recovery of only a few thousand dollars. In the context of the present case and the resulting decision on appeal, it is unclear whether or not this Court was aware of the existence of a contingent fee in this instance.

The Court in its decision makes reference to two other points which are problematic. At page 7 the Court states that "among the class members actively engaged in this litigation there is one individual who purchased his individual

share for $44,752.50." (emphasis ours) We do not know to whom this statement refers since it would not be applicable to Messrs. Share, Gilhooley, Woodruff or East Bay.

Moreover, the Court apparently is not aware that the promissory notes executed in connection with the purchase of the interests does not create personal liability thereon in this instance. Therefore, the dollar amount involved in these circumstances cannot be the purchase price. The amended complaint, as framed, to rescind such notes was as against the Hong Kong Bank which was asserting a position contrary at that time.

Thus, from the standpoint of determining what constitutes an amount small enough to relate to the "death knell" concept, it is the actual dollar mount involved, not the purchase price, which should be considered.

III. ISSUE OF PUBLIC IMPORTANCE; SUGGESTION FOR REHEARING IN BANC

In its Opinion of July 6, this Court adhered to a rigid construction of the policies underlying 28 U.S.C. Section 1291. This Court also made a rather narrow holding based on the technical capabilities of obtaining an appeal of the denial of class certification.[6/]

However, even the Supreme Court of the United States has acknowledged that sometimes a coincidentally novel arrangement of the underlying facts may lead to irreparable harm for those plaintiffs denied immediate review under the constricting policies underlying Section 1291. See, for instance, Cohen, supra, and Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

A rehearing in banc in this instance is appropriate for the following reasons:

1. The present appeal involves a question of public importance concerning the practical accessibility to qualified legal representation in complex litigation; and
2. The present appeal involves a comparatively novel set of underlying factual circumstances (with regard to other Ninth Circuit opinions) more clearly evidencing the potential harm resulting from rigid

6/ See page 7 of this Court's Opinion, and discussion supra.

adherence to 28 U.S.C. Section 1291.

Class action suits are a tremendously potent mechanism for expanding the accessibility to quality legal services for those persons who, because of the financial inability to proceed individually on a "small" claim,[7/] are otherwise without a remedy. Appellants respectfully submit that if this Court's holding is to be used as a precedent in future cases wherein small investors in a securities fraud are left with no realistic remedy, such a holding should be that of the full Court. Otherwise, there certainly exists legitimate concern for the ability of this Court to reappraise its position should there ever occur a more clear-cut case of irreparable harm to small investors occupying positions similar to the present appellants.[8/]

This Court's decision of July 6 also involved a novel set of underlying facts apparently not previously determined

7/ Appellants urge this Court to realistically consider the possibilities of obtaining competent legal counsel to prosecute a complicated securities case where the stakes for an individual plaintiff are a few thousand dollars. It is remarkable how "small" a persons's life savings may become at that point, and appellants urge that undue emphasis is placed on the ability of one or more plaintiffs to proceed individually, thereby forcing the remaining plaintiffs to literally sit out in the cold until the conclusion of litigation which may never occur.

8/ See Judge Friendly's pertinent comments in Parkinson v. April Industries,Inc., 520 F.2d 650, 658-660 (2d Cir. 1975)

in this Circuit. In Weingartner v. Union Oil Company of California, 431 F.2d 26 (9th Cir. 1970), an appeal was denied where the Court clearly found that all the plaintiffs had the financial means to proceed individually. No such finding was made in this case; indeed, appellants contend that, at most, a small minority of the plaintiffs have even demonstrated the minimum requisite economic capabilities for cases of this type.

In Falk v. Dempsey-Tegeler & Co., Inc., 472 F.2d 142 (9th Cir. 1972), the appeal was denied where the class of plaintiffs consisted of 1,536 customers in 27 states whose accounts were handled by 210 representatives in 36 offices of defendant. The present case is, by comparison, incapable of generating that degree of complexity. The individual plaintiff in Falk also had a claim for $14,125.00; no named petitioner/plaintiff in this case has an actual claim greater than $4,813.00 (see Appellants' Response to Reply Briefs, page 21).

Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975) is clearly inapposite simply on the facts and the posture of that case on appeal -- class certification had already been granted; the concept of "reverse death knell" was not accepted by this Court.

Wherefore, petitioners respectfully request that this Court grant a hearing in banc.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

DATED: July 19 , 1976.

RICHARD A. DeSANTIS
LAW OFFICES OF RICHARD A. DeSANTIS

By _____
RICHARD A. DeSANTIS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 11 1976

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

RICHARD HUDSON SHARE, et al., Plaintiffs-Appellants,	
vs.	NO. 74-3282
AIR PROPERTIES G., INC., et al., Defendants-Appellees.	O R D E R

Before: GOODWIN and SNEED, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Goodwin and Sneed have voted to reject the suggestion for a rehearing en banc, and Judge East has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Dated: August 11, 1976

RECEIVED
AUG 16 1976
Richard A. DeSantis

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

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OK 8.11.76

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Attorneys for Petitioners-Appellants

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD HUDSON SHARE, et al., Petitioners-Appellants, vs. AIR PROPERTIES G, INC., et al., Respondents-Appellees.	No. 74-3282 MOTION FOR AN ORDER STAYING THE ISSUANCE OF MANDATE: ORDER .

Appellants Richard Hudson Share, et al., hereby move this Court for an Order staying the issuance of mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure.

The stay is requested so that Appellants may petition the Supreme Court for a writ of certiorari respecting this Court's Opinion in this case filed July 6, 1976. Appellant's Petition for Rehearing en banc was denied on August 11, 1976.

As under Rule 41(a), Fed. R. App. P., this Court's mandate would otherwise issue on August 18, 1976, Appellants respectfully request that this Court stay such mandate, or, should the mandate

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have already issued by the time this motion is received, that such mandate be recalled for thirty (30) days. Perkins v. Standard Oil Company of California, 487 F.2d 672, 674 (9th Cir. 1973).

Dated: August 17, 1976

Respectfully Submitted,
LAW OFFICES OF RICHARD A. DeSANTIS

BY Barry L. Adamson
Barry L. Adamson

United States Court of Appeals
FOR THE NINTH CIRCUIT

FILED
AUG 19 1976
ERIC E. MELEI, JR. CLERK
U. S. COURT OF APPEALS

RICHARD HUDSON SHARE, et al.,
Petitioners-Appellants,
vs.
AIR PROPERTIES G, INC., et al.,
Respondents-Appellees.

No. 74-3282
DC #CV-71-2358 LTL

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Barry L. Adamson, Esq.
counsel for the Appellants (Share et al) and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellants (Share et al) herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before September 10, 1976

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Joseph T. Sneed
Joseph T. Sneed
United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.

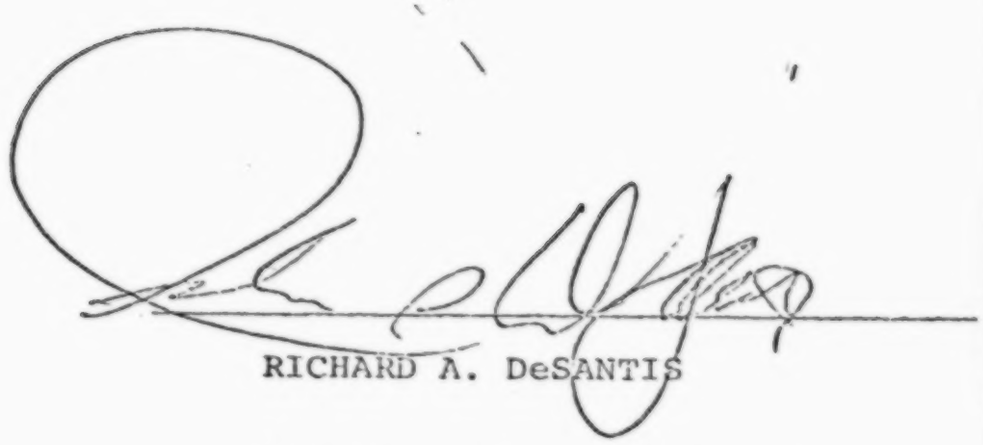
RECEIVED
AUG 23 1976
Richard A. DeSantis

FORM NO. 14

EE

CERTIFICATE OF SERVICE

I certify that this 9th day of September, 1976, I caused three copies of the within Petition for Writ of Certiorari to be served upon each of the respondents in this case by United States mail addressed to said respondents' respective counsel.



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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-364

CHARLES EDWARD WOODRUFF, JAMES GILHOOLEY, EAST BAY MODEL ENGINEERS SOCIETY, INC.,

Petitioners,

vs.

AIR PROPERTIES G., INC., THE HONG KONG BANK OF CALIFORNIA, REPUBLIC NATIONAL BANK AND TRUST COMPANY, a National Banking Institution, LAND DATA RESEARCH COMPANY, RONALD W. CURRAN, BYRON H. CUNNINGHAM, MARTIN ACKERMAN, C. N. HISLOP, JR., FIRST AMERICAN TITLE INSURANCE COMPANY, LAND DATA INVESTMENTS, INC., GARY MARTIN, ADAMS PROPERTIES, INC., WELLWOOD BEALE, AIR FARMS NW 80, LTD., SAVERS EQUITY FUNDING CORPORATION, JOEL BERGER, PRO LAND DATA ASSOCIATES, SANT PALLAN, WILLIAM L. PEREIRA & ASSOCIATES, RAWLS ACKER, DON O'BRIEN,

Respondents.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-364

CHARLES EDWARD WOODRUFF, JAMES GILHOOLEY, EAST BAY MODEL ENGINEERS SOCIETY, INC.,
Petitioners,

vs.

AIR PROPERTIES G., INC., THE HONG KONG BANK OF CALIFORNIA, REPUBLIC NATIONAL BANK AND TRUST COMPANY, a National Banking Institution, LAND DATA RESEARCH COMPANY, RONALD W. CURRAN, BYRON H. CUNNINGHAM, MARTIN ACKERMAN, C. N. HISLOP, JR., FIRST AMERICAN TITLE INSURANCE COMPANY, LAND DATA INVESTMENTS, INC., GARY MARTIN, ADAMS PROPERTIES, INC., WELLWOOD BEALE, AIR FARMS NW 80, LTD., SAVERS EQUITY FUNDING CORPORATION, JOEL BERGER, PRO LAND DATA ASSOCIATES, SANT PALLAN, WILLIAM L. PEREIRA & ASSOCIATES, RAWLS ACKER, DON Q'BRIEN,

Respondents.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondent First American Title Insurance Company respectfully opposes the Petition for Issuance of a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

Opinions in the Courts Below.

Respondent accepts Petitioner's statement relating to the opinions below.

Jurisdiction of This Court.

Respondent accepts Petitioner's statement relating to jurisdiction of this Court.

Question Presented for Review.

Was the United States Court of Appeals for the Ninth Circuit correct in ruling that it had no jurisdiction to hear the appeal from the order of the District Court denying class action status to the present case?

Rules and Regulations Involved.

This Petition involves Rule 23 of the Federal Rules of Civil Procedure for the United States District Courts and Sections 1291 and 1292 of Title 28, United States Code. Texts of those rules are set out in the Appendix to this Petition.

Statement of the Case.

The First Amended Complaint in this action was filed on October 20, 1971. On May 18, 1972, prior to any discovery being undertaken, the District Court, pursuant to a motion by plaintiffs, granted an order permitting the case to proceed as a class action. This order was made without prejudice to the defendants' bringing a motion to modify it, or have it withdrawn upon a showing of good cause. No notice of the pendency of a class action, as required by Rule 23 of the Federal Rules of Civil Procedure, was sent out to members of the purported class, and up to the present time, such notice has not been sent.

The plaintiffs in the action were three individuals and one non-profit organization who acquired undivided interests in parcels of real property in the vicinity of the Paso Robles, California, Airport. As part of the marketing program of the undivided interests, the promoters of the project made oral and witten representations over a period of time concerning the property and its ability to be developed into an all-cargo air park.

The purchasers paid forty percent (40%) of the purchase price of their undivided interest as a cash down payment and executed a promissory note secured by a deed of trust for the balance. The deeds of trust securing the balance owed by the purchasers were junior to deeds of trust executed between the promoters and the original holders of the real estate.

Respondent First American Title Insurance Company acted as escrow agent, issued policies of title insurance, and also was nominated as trustee under various deeds of trust.

The Second Amended Complaint, which was filed on August 28, 1972, is framed in seventeen (17) separate counts, with eight of the counts having allegations against respondent First American Title Insurance Company.

These eight counts allege that the promoters' sales activities (1) violated the anti-fraud provisions of Section 17a of the Securities Exchange Act of 1933 (15 U.S.C. Sec. 77q(a)); Section 10b of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78j(b)), and Rule 10b-5 of the Securities Exchange Act; (2) violated the registration and prospectus requirements of Sections 5 and 10 of the Securities Exchange Act of 1933; (3) violated the prohibition against use of a misleading prospectus or oral communication contained in Section 12(2) of the Securities Exchange Act of 1933 (15 U.S.C. Section 771(2)); (4) violated the analogous provisions of the California Corporate Securities Act of 1968 (Cal. Corp. Code Sec. 25000 *et seq.*); (5) violated provisions of the Interstate Land Sale Full Disclosure Act (15 U.S.C. Sec. 1701 *et seq.*); (6) violated provisions of the California Subdivided Land Law

(Cal. Bus. & Prof. Code, Sections 11000 *et seq.*); (7) violated provisions of the California Subdivision Map Act (Cal. Bus. & Prof. Code, Sections 11500 *et seq.*); (8) constituted a common law fraud against the plaintiff; (9) constituted a common law conspiracy to defraud the plaintiffs and (10) constituted a common law conspiracy to violate each and all of the federal and state statutes which plaintiffs allege were violated during the course of Land Data sales activities.

The complaint further alleges that respondent First American aided and abetted the other defendants' violations as set forth in the complaint.

After the Second Amended Complaint was at issue, the parties commenced extensive discovery. On July 8, 1974, there was a thorough evidentiary hearing in the District Court before the Honorable Judge Lydick, held upon motions of defendants First American Title Insurance Company, William A. Pereira and Associates and Adams Properties, for determination that the action should not be maintained as a class action.

On August 20, 1974, the District Court, pursuant to Rule 23, issued its order withdrawing its previous conditional class certification. The court stated in its order:

> "The record *presently* before the court indicates that common questions of law or fact clearly do not predominate over questions affecting only individual members of the alleged class, and that substantial problems of manageability would be encountered if this suit were to proceed as a class action.

> "Accordingly, defendants' motions for a determination that this case may not be maintained as a class action are granted." (Emphasis added).

The plaintiffs filed a Notice of Appeal from that order and also filed a motion to join 172 other claimants as plaintiffs in the action. These 172 people are individuals who executed written retainer agreements with the plaintiffs' counsel. After oral argument, the motion was taken under submission by the Honorable Judge Lydick, who later vacated the submission after the appeal from his order denying class action status was filed.

On July 6, 1976, the Court of Appeals for the Ninth Circuit filed its opinion dismissing the appeal of the plaintiffs from the order of the District Court denying class action status to the case.

ARGUMENT.

I

The Court of Appeals for the Ninth Circuit Correctly Determined That the Order in the Within Action Issued by the District Court Was Not Appealable Under 28 U.S.C. Section 1291, and Said Decision Raises No Issue Warranting Review by This Court.

A. The Order of the District Court Did Not Sound the "Death Knell" of the Action.

As was stated by this court in *Eisen v. Carlisle and Jacqueline, et al.,* 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140:

> "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is in practical consequence but a single controversy."

In the *Eisen* case, *supra,* this court made the observation that:

> "Economic reality dictates that petitioner's suit proceed as a class action or not at all."

The Petitioners' reliance on the *Eisen* case is misplaced because, as the record on appeal to the Court of Appeals clearly documented, economic reality dictates that the case can proceed even though not on a class action basis, *i.e.,* that decertification of the class did not sound the "death knell" of the action.

The Court of Appeals below correctly stated that in various Circuit Court decisions, there has been a

confusion between the "death knell" doctrine and the "collateral order" doctrine. Simply stated, the "death knell" doctrine is that where denial of class action certification would toll the "death knell" of the action because the individual plaintiffs' claim for damages was insufficient to support further proceedings on a non-class basis, then an appeal under 28 U.S.C. Section 1291 would be allowed.

The Petitioners, at pages 5 through 12 of their brief, take issue with the fact that the Court of Appeals held that it would be appropriate to look to the dollar amount of the claim of any class member, as opposed to a named plaintiff, in determining whether a denial of class action status would sound the death knell of the action. It is the Petitioners' position that a determination must be made that such an individual will with a "realistic cognizable probability" prosecute his individual action to final judgment.

The Court of Appeals correctly held that if the plaintiffs were concerned that the case would not proceed at all if it was not a class action, then it was incumbent upon them to demonstrate this fact to the trial court. This was not done.

It is clear that this action is not a case where there are hundreds of unnamed individuals with small claims who may not even have knowledge of the lawsuit. Rather, as the record on appeal clearly documented, there are some members of the class who have investments of over $50,000 and 172 individuals have signed retainer agreements with the attorney for the plaintiffs

and presumably have full knowledge of what is going on with the case. Indeed, a motion to join them has been made in the federal court, and in the companion and almost identical state court action a motion permitting joinder of these individuals has been granted. It should be noted that in the state court case, entitled "Lee, et al. v. Martin, et al." filed in the Superior Court of San Luis Obispo County, California, case number 40651, the court also ruled that the case could not proceed as a class action. That ruling is also being appealed by the named plaintiffs in that case. It is not disputed that the purported classes in the federal and state court actions are identical. It should be noted too that in California the minimal jurisdictional amount of the Superior Court is $5,000.

According to a sworn affidavit of the attorney for the plaintiffs, appearing in the Clerk's Record, page 570, he has retainers from individuals who have invested in the aggregate over $325,000, not including the amounts of the notes outstanding. The fact that these individuals may not at the present time be named plaintiffs has absolutely no bearing on their determination and motivation to proceed with the litigation. Indeed, in plaintiffs' petition to this court at page 9, it is pointed out that the plaintiffs' attorney is representing them on a contingency fee basis. In those cases in which the motivating force behind the class action is the attorney, rather than the named plaintiffs, a strong argument can be made that the only important factor is the size of the potential attorney's fees, and not the size of the named plaintiffs' claims.

B. The "Collateral Order" Doctrine Does Not Permit the Review of the Order Denying Class Action Status in This Case.

In *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), extensively relied upon by Petitioners, this Court held that a final decision under 28 U.S.C. Section 1291 was not limited to "those final judgments which terminate an action." In *Beneficial Loan*, a stockholders' derivative action was brought against a corporation. Federal jurisdiction was based on diversity. The trial court held that a state statute which required the plaintiffs to give security prior to trial for the expenses reasonably anticipated by the defendant in defense of the action was inapplicable in a federal proceeding. On appeal, the Third Circuit reversed and held the state statute to be applicable to the plaintiff. On *certiorari*, the Supreme Court affirmed, and on the appealability issue held that the order sought to be appealed from

> ". . . appears to fall in that small class which finally determined claims of rights separable from and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. 541 at 546.

In *Beneficial Loan*, therefore, an order relating to whether the plaintiff had to give security for defendants' anticipated expense in defending an action *prior* to

the action going forward was held to be a final decision on that particular matter within the meaning of 28 U.S.C. Section 1291. Needless to say, the background facts of *Beneficial Loan* bears little resemblance to those in the instant case. The issues before the court in *Beneficial Loan* were not those that relate to a class action matter. Additionally, *Beneficial Loan* was decided at a time when there was no interlocutory appeal as is now provided by 28 U.S.C. Section 1292 (b), and this suggests that the *Beneficial Loan* case should be reserved for the exceptional case.

The case of *Eisen v. Carlisle and Jacqueline, supra,* did involve a class action proceeding. There the trial court from the Circuit Court, reversed its earlier order and ordered that an antitrust and securities law action proceed as a class action. In connection therewith, the trial court also entered the further order that inasmuch as two and one-quarter million members of the prospective class could be identified by name and address, and since it would cost $225,000 to send individual notice to all of them, that individual notice would only be sent to a limited number of the prospective class, and that, as to the remainder of the class, there would only be notice by publication. Furthermore, after a preliminary hearing, the trial court determined that the plaintiffs were "more than likely" to prevail at trial and for that reason ordered that the defendants pay 90 percent of the cost of the notification scheme.

Eisen was before the Second Circuit on three occasions. In the so-called *Eisen I,* case, the Second Circuit held that the trial court's initial determination that the action should not proceed as a class action was a final decision under 28 U.S.C. Section 1291. *Eisen v. Carlisle and Jacqueline,* 370 F.2d 119 (2d Cir. 1966). In *Eisen III* the Second Circuit held in effect that the latter order of the trial court granting class action status and the further order concerning notice and requiring prepayment of 90 percent of the notification expense by the defendant was also a final decision under 28 U.S.C. Section 1291. *Eisen v. Carlisle and Jacqueline,* 479 F.2d 1005 (2d Cir. 1973). On *certiorari* this Court on the appealability issue held that the Second Circuit in *Eisen III* had jurisdiction under 28 U.S.C. Section 1291 "to review fully the District Court's resolution of the class action notice problems in this case."

It would appear that in *Eisen v. Carlisle and Jacqueline, supra,* this Court was not so much concerned with the mere order that the case proceed as a class action as it was with that part of the order relating to notice, and even more particularly with that part of the order that saddled the defendant with 90 percent of the notification expense.

The instant case is distinguishable from *Eisen v. Carlisle and Jacqueline, supra* and *Cohen v. Beneficial Loan Corp., supra* because the order sought to be reviewed only denied class action status, and makes

no reference to notice or who must bear the cost of notice. The Ninth Circuit, in the present case, correctly ruled that a denial of class action status is not a collateral order.

II

There Is No Conflict Among the Circuits Warranting Review by This Honorable Court.

Petitioners point out that the Third, Sixth, Seventh and Tenth Circuits "have apparently determined that under no condition will an appeal lie from the denial of class certification." (Petition, p. 4). This is not accurate, for most of the cases cited do not flatly rejectly appealability in general, but rather only because of specific facts involved in the cases. For instance, in the Tenth Circuit case of *Gerstle v. Continental Airlines, Inc.*, 466 F.2d 1374, the court held that an order decertifying an action was interlocutory and not final and appealable, but in so holding noted that under Federal Rules of Civil Procedure, Rule 23(c)(1), an order by a trial court relating to class action status may be conditional and may be altered or changed before decision on its merits. Likewise, the Third Circuit case of *Hackett v. General Host Corporation*, 455 F.2d 618, *cert. denied* 407 U.S. 925 (1972), criticized the "death knell" doctrine but held it to be not applicable in any event where federal statute provides for recovery of attorneys' fees and costs.

It should further be noted that the Third, Sixth and Seventh Circuits decisions cited by Petitioners in their brief at page 4 were all prior to the decision of this Court in *Eisen v. Carlisle and Jacqueline, supra,* in 1974.

III

There Were Procedures Available to Petitioners to Have the Order of the District Court Reviewed Which Petitioners Did Not Pursue.

It should be noted that there were other avenues for appellate review of class action determination. A writ of *mandamus* under 28 U.S.C. Section 1651 may be available to review class action determinations. See *McDonnell Douglas Corporation v. United States District Court*, 20 F.R.S.2d 11 (9th Cir. 1975); *Interspace Corp. v. City of Philadelphia*, 438 F.2d 401 (3d Cir. 1971); *Gold Strike Stamp v. Christiansen*, 436 F.2d 791 (9th Cir. 1970); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974). This procedure was not used by Petitioners.

Further, interlocutory appeals of class action determinations under 28 U.S.C. Section 1292(b) may be permitted if the statutory requirements are met by either plaintiffs or defendans. *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974), *cert. denied* 419 U.S. 885 (1974) (appeal by defendant permitted); *Zahn v. International Paper Company*, 496 F.2d 1033 (2d Cir. 1972), *aff'd* 414 U.S. 291 (1973) (appeal by plaintiffs permitted); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) (appeal by plaintiff permitted); *Kline v. Coldwell Banker and Company*, 508 F.2d 226 (9th Cir. 1974), *cert. denied* 421 U.S. 963 (1975) (appeal by defendant permitted).

Conclusion.

This Court should deny the Petition for a Writ of Certiorari.

Respondents dispute that there are, as Petitioners contend, two questions worthy of review. The Petitioners

first ask whether the Court may look only to named active class members to determine if any has the requisite financial interest to maintain an individual action in the federal court. Second, they ask whether the right to maintain a class action lawsuit in and of itself is a collateral right which should be allowed an appeal as of right under Section 1291 of Title 28 of the United States Code. Despite their attempts to characterize the issues involved as important, novel and unsettled in a manner demanding this Court's attention, Petitioners have not shown that the Court of Appeal for the Ninth Circuit erred in defining the rights under Title 28, U.S.C. Section 1291. There is no conflict among the circuits warranting review, and clearly the facts before the Court of Appeals were such to make its decision totally correct. There is no need for this Court to review that decision.

Respectfully submitted,

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First American Title Insurance Co.

APPENDIX.

Federal Rules of Civil Procedure.

Rule 23. Class Actions.

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final in-

junctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude

him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the

proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A Class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Title 28, U.S.C.

Section 1291. Final decisions of district courts.—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. (June 25, 1948, c. 646, Sec. 1, 62 Stat. 929; Oct. 31, 1951, c. 655, Sec. 48, 65 Stat. 726; July 7, 1958, P. L. 85-508, Sec. 12(e), 72 Stat. 348.)

Section 1292. Interlocutory decision.—(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(b) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of

Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (June 25, 1948, c. 646, Sec. 1, 62 Stat. 629; Oct. 31, 1951, c. 655, Sec. 49, 65 Stat. 726; July 7, 1958, P. L. 85-508, Sec. 12(e), 72 Stat. 348; Sept. 2, 1958, P. L. 85-919, 72 Stat. 1770.)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-364

CHARLES EDWARD WOODRUFF, JAMES GILHOOLEY, EAST BAY MODEL ENGINEERS SOCIETY, INC.,
Petitioners,

VS.

AIR PROPERTIES G., INC., THE HONG KONG BANK OF CALIFORNIA, REPUBLIC NATIONAL BANK AND TRUST COMPANY, a National Banking Institution, LAND DATA RESEARCH COMPANY, RONALD W. CURRAN, BYRON H. CUNNINGHAM, MARTIN ACKERMAN, C. N. HISLOP, JR., FIRST AMERICAN TITLE INSURANCE COMPANY, LAND DATA INVESTMENTS, INC., GARY MARTIN, ADAMS PROPERTIES, INC., WELLWOOD BEALE, AIR FARMS NW 80, LTD., SAVERS EQUITY FUNDING CORPORATION, JOEL BERGER, PRO LAND DATA ASSOCIATES, SANT PALLAN, WILLIAM L. PEREIRA & ASSOCIATES, RAWLS ACKER, DON O'BRIEN,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Respondents Adams Properties, Inc., and Gary A. Martin (hereinafter collectively "Adams"), respectfully submit that the Ninth Circuit Court of Appeal correctly held that the Order of the District Court

determining that the within action should not proceed as a class action was not an appealable order under the facts of this case; and that said Court correctly dismissed that appeal. The decision is not in conflict with decisions of other courts of appeal; rather, the Ninth Circuit applied to this case the tests of appealability enunciated in several prior appellate decisions from several circuits, in many of which *certiorari* has been denied. The decision does not involve an important question of law which has not been decided by this Honorable Court. (*Cf., Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 162 (1973)). Accordingly, these respondents respectfully submit that *certiorari* is neither necessary nor appropriate in this action (Rule 19, Rules of the Supreme Court of the United States).

This action was originally commenced as a proposed class action by Richard Hudson Share[1]; Petitioners Charles Edward Woodruff, James Gilhooey and East Bay Model Engineers Society, Inc. joined the action as plaintiffs on or about October 20, 1971. The proposed class constituted approximately three hundred (300) persons. The purchase price of their respective transactions ranged from $2,500 to $50,552.50.

[1]Mr. Share was originally the sole plaintiff in this action. He is an attorney and has acted as an associate counsel for the plaintiffs since the inception of the action. On June 16, 1976, he moved the trial court to be permitted to withdraw as a representative plaintiff on the ground that he had "lost interest" in the action. That motion was granted, and he is no longer a party to the controversy. That "loss of interest" did not result from any settlement with or any effort by any defendant in the action. The remaining named plaintiffs did not join in the motion and are continuing with the action.

On May 18, 1972, the trial court granted conditional class status to the action; that order was made prior to any discovery being taken by the defendants. Adams were joined in the action by the second amended complaint filed *subsequent* to the Order granting conditional class certification. The second amended complaint purported to state seventeen counts for relief against various and often different defendants.

The defendants commenced their discovery subsequent to the filing of the Second Amended Complaint. On August 20, 1974, upon motions of several defendants including Adams, which said motions were predicated upon substantial deposition testimony, including that of all the named plaintiffs, the trial court found that common issues of law and fact did *not* predominate in the action, as required by Rule 23, F.R.C.P., but that the issues of fact and law required to be proved by each potential claimant in order to establish the merits of his respective claim were so disparate that individual proof would be required by *each* claimant. The trial court therefore determined that this action could not be maintained as a class action and withdrew class certification.

Plaintiffs filed a Notice of Appeal from that order. *They also filed a motion in the district court to join one hundred and seventy-two (172) other claimants as plaintiffs in the action.* That motion has been stayed pending determination of plaintiffs' appeal from the subject order.

On July 6, 1976, the Ninth Circuit filed its opinion dismissing the plaintiffs' appeal.

Other claimants, also represented by plaintiffs' counsel herein, have simultaneously been prosecuting a similar action against many of the same defendants (including these respondents), as well as some additional defendants, in the Superior Court of the State of California for the County of San Luis Obispo, being action number 40651 in that court. That action was also filed as a proposed class action; it was admitted and then stipulated that both proposed classes would be comprised of the same persons with regard to the same transactions. On February 13, 1976, the San Luis Obispo Superior Court entered its order denying class action certification to that action; an appeal has been filed from that order to the Court of Appeal of the State of California and is now pending in that court.[2]

I

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE ORDER IN THE WITHIN ACTION WAS NOT APPEALABLE UNDER THE "DEATH KNELL" RULE

The Ninth Circuit, in its decision herein, applied the so-called "death knell" exception to the general rule that appeals will lie only from final judgments entered in the trial court (28 U.S.C. §1291). (See, *e.g., Eisen v. Carlisle & Jacquelin,* 370 F.2d 119 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967); *Weingartner v. Union Oil Company of California,* 431 F.2d 26 (9th Cir. 1970).) The "death knell" concept has been discussed and applied by various circuit courts; it provides an appeal from denial of class action status in those particular cases where the "death knell" of the action is truly sounded by denial of class action status.

> "The death knell doctrine . . . is concerned with survival of the basic cause of action . . . and is grounded on the notion that a sentence of death should not be passed on a cause of action by only one judge." (*Share v. Air Properties G, Inc.,* ..... F.2d ..... (9th Cir. 1976); slip opinion p. 4; appendix A to petition for writ.)

The crux of the Ninth Circuit decision here is that the death knell has *not* been sounded in this action and that the order is therefore not appealable. That determination is entirely appropriate upon the facts of this case. Petitioners have made an impassioned, *but totally unsubstantiated,* plea that the action cannot proceed unless it proceeds as a class action. They contend that the Ninth Circuit should have made that factual determination. Notably, however, petitioners failed entirely to present *any* evidence (including the matters they now seek to bring before this Honorable Court by conclusionary statement) in the trial court that would support a contention that the action could not proceed on behalf of individual plaintiffs. The plaintiffs have the burden of establishing, in the trial court, that the action cannot proceed as a result of denial of class action certification. (*Gosa v. Securities Investment Co.,* 449 F.2d 1330 (5th Cir. 1971).)

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[2]Respondents submit that this Court may take judicial notice of the pleadings filed in that action (Rule 201, Federal Rules of Evidence).

It should be noted that those plaintiffs are also actively pursuing their rights.

The burden must logically be placed upon the plaintiffs; it is they who must establish the potential value of the respective claims of the proposed class members as well as the other factors which affect the potential viability of the action. (See, *e.g., Graci v. United States,* 472 F.2d 124 (5th Cir. 1973), *cert. denied,* 412 U.S. 928 (1973).) The appellate court is *not* the forum in which to make this showing. It is the *trial court* which is empowered to weigh facts and make these determinations; it is in the trial court that evidence can be introduced. If the appellate courts are to try the facts of continued viability in every appeal from denial of class action certification, then not only the final judgment rule, but the division of functions between the appellate and trial courts, will be rendered meaningless.

Petitioners introduced *no evidence* before the trial court to establish any claim that the "death of the action" would necessarily result from decertification of the class, and there is no basis in the record for the argument which they present to this Court, particularly in light of the *prima facie* evidence to the contrary. It is thus wholly improper for Petitioners to argue that the court failed to determine whether there was "any cognizable probability that there will be subsequent litigation" (Pet., p. 7).

The Ninth Circuit decision here specifically concurred with the decisions of the Fifth Circuit that "the individual claims, the extent of plaintiffs' resources, and the probable expense of prosecuting the lawsuit are all factors relevant to the issue of viability. (*Graci v. United States,* 472 F.2d 124 (5th Cir. 1973), *cert. denied,* 412 U.S. 928 (1973))." (Slip opinion, pp. 5-6; appendix AA to petition.) Analysis of each of these factors in this case precludes a finding that the death knell must necessarily have been sounded. Petitioners argue that the "average claim" would be $4,600 (Pet., p. 3). The Ninth Circuit expressly refused to decide in this case whether averaging claims was appropriate in any circumstances. However, that approach is certainly improper and misleading here. At the beginning of the Land Data project purchases were made at $2,500 an acre, so that many persons purchased in that price range. By the end of the project, prices were $13,500 an acre, and *many* persons thus committed for substantial purchase prices. (See C.R. pp. 402-411, appended as Exhibit A hereto for convenience, for a partial list of potential claimants and the amount of their respective purchase prices.) Thus, it should be noted that a substantial number of persons entered into contracts for purchases in excess of $10,000, sixteen potential claims exceed $20,000 *and ten exceed $39,000 per person.* That is not the type of claim that the "death knell" doctrine was intended to protect. (*Cf.,* cases in which appeals have been granted: *Korn v. Franchard Corp.,* 443 F.2d 1301 (2d Cir. 1971) less than $1,000; *Green v. Wolf Corp.,* 406 F.2d 291 (2d Cir. 1968) $386.00; *Eisen v. Carlisle & Jacquelin,* 370 F.2d 119 (2d Cir. 1966) $70.00; to cases where appeals have been dismissed: *Shayne v. Madison Square Garden Corp.,* 491 F.2d 397 (2d Cir. 1974), $7,482.00; *Gosa v. Securities Investment Co., supra,* $3,322.20;

Milberg v. Western Pacific Railroad Co., 443 F.2d 1301 (2d Cir. 1971), $8,500.00.)

This is not a consumer fraud action where the claims are so small that they can only be prosecuted by the class action mechanism. Many purchasers from Land Data have claims of sufficient size to justify individual prosecution. Moreover, one hundred seventy-six (176) claimants have moved to join in this action as individual plaintiffs.[3] It cannot be suggested that their collective claims are not sufficient to encourage their counsel to continue his contingency fee representation. Certainly they have proceeded with great vigor to date in maintaining two basically duplicatory actions in two different courts.

Adams respectfully submit that the Ninth Circuit correctly enunciated and applied the limited "death knell" exception to the final judgment rule in this action.

II

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE SUBJECT ORDER IS NOT APPEALABLE AS A "COLLATERAL ORDER"

The Ninth Circuit, analyzing the within case based on the holding of *Cohen v. Beneficial Loans Corp.*, 337 U.S. 541 (1949), determined that the Order in question was not a collateral order from which an appeal would lie as a matter of right. The Ninth Circuit held that the district court's order was *not* separable from

[3]A similar motion was made *and granted* in the San Luis Obispo Superior Court proceeding.

the rights asserted by the plaintiffs in the within action, although the Court clearly recognized, contrary to petitioners' assertion, that a denial of class certification *may* be a collateral—and thus an appealable—order "under proper circumstances." (Slip opinion p. 8; Appendix AA to Petition.) (*Cf., Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. at p. 172.)

As the Ninth Circuit held here, the facts involved in determining the propriety of class status in this case are inexorably interwoven with the merits of the claims for relief and are not collateral thereto. There could be no better proof of that fact than the content of the briefs filed on the purported appeal from the order decertifying the class herein, which deal at length with the merits of the claims for relief. Indeed, the merits of the various claims for relief constituted the bulk of petitioners' brief before the Ninth Circuit.

A meaningful appeal on this issue does exist upon final judgment rendered in the trial court. (*Cf., Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied* 394 U.S. 928 (1969).) Moreover, it cannot seriously be argued that an attorney proceeding upon a contingency fee does not have ample incentive to appeal from denial of a class action certification if the plaintiffs succeed on the merits in the trial court.

III

CONCLUSION

Respondents Adams respectfully submit that Petitioners have failed to establish any basis for issuance of a Writ of Certiorari in the within action. The decision of the Ninth Circuit holding that the Order of class decertification in this case is not appealable is squarely in accord with prior appellate decisions on the law and, further, is correct as applied to the facts of this case. The petition should therefore be denied.

BANCROFT, AVERY & MCALISTER
SANDRA J. SHAPIRO
BERNARD I. SEGAL
Attorneys for Respondents
Adams Properties, Inc. and Gary Martin

Dated, September 29, 1976.

(Appendix Follows)

Appendix

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
10/16/71	Friedman, Arthur	$ 16,000.00	3.20	Q- 1
		14,152.50	1.53	B-14 (1)
"	Neville, Louise	$ 4,800.00	1.60	A- 2
		5,600.00	1.60	A- 3
		8,000.00	2.00	A- 4 Resale
"	Allum, Ronald	$ 9,945.00	1.02	B-14 (2)
"	Yurk, Clarence	$ 12,638.12	.91	Q- 3
"	Julien, Robert	$ 12,207.50	.95	Q- 2
		7,324.50	.57	Q- 2
"	Peterson, Donald	$ 2,800.00	.80	A- 3
		3,200.00	.80	A- 4
"	Hueckel, Manfred	$ 11,793.75	1.27	B-14 (1)
		7,500.00	3.00	A- 1
"	Rosellini, Davey	$ 12,207.50	.95	Q- 2
10/18/71	Treon, Stuart	$ 4,800.00	1.60	A- 2
"	Howard, Andrew	$ 7,000.00	2.00	A- 3
"	Johnson, Jr., D. O.	$ 12,207.50	.95	Q- 2
"	Schatz, Melvin	$ 9,766.00	.76	Q- 2
		12,000.00	2.40	Q- 1 (1)
"	Galen, John	$ 12,207.50	.95	Q- 2
"	McCarthy, John	$ 16,800.00	2.80	Q- 1 (2)
"	Crall, Robert	$ 12,207.50	.95	Q- 2
"	Hirth, Glenn	$ 7,200.00	1.20	Q- 1 (2)
"	Becker, John	$ 12,207.50	.95	Q- 2
"	Durango Investment Corp.	$ 11,793.75	1.27	B-14 (1)
"	Koundakjian, T.	$ 12,000.00	2.00	Q- 1 (2)
		24.000.00	4.00	Q- 1 (2)
		26,856.50	2.09	Q- 2
"	Friedman-Jacobs Co.	$ 16,000.00	3.20	Q- 1 (1)
	Arthur Friedman & Morris Friedman	14,152.50	1.53	B-14 (1)
"	McCormick, William	$ 8,400.00	2.40	A- 3
"	Royal, William	$ 12,207.50	.95	Q- 2

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
10/18/71	Nasseem, M.	$ 12,000.00	2.00	Q- 1 (2)
		12,431.25	1.27	B-14 (2)
"	Chavez, R.	$ 6,000.00	1.20	Q- 1 (1)
"	Isaeff, N. P.	$ 12,207.50	.95	Q- 2
"	Glathe, J. P.	$ 12,638.12	.91	Q- 3
"	De Somer, Abraham	$ 9,945.00	1.02	B-14 (2)
		12,207.50	.95	Q- 2
		11,700.00	1.20	A- 2 Resale
"	De Somer, Myles	$ 12,000.00	2.00	Q- 1 (2)
		11,793.75	1.27	B-14 (1)
		11,793.75	1.27	B-14 (1)
		12,207.50	.95	Q- 2
"	De Somer, Inez	$ 12,000.00	2.00	Q- 1 (2)
"	Ness, M. J.	$ 17,090.50	1.33	Q- 2
"	Marshall, Ralph	$ 20,000.00	4.00	Q- 1 (1)
		6,000.00	1.20	Q- 1 (1)
		12,207.50	.95	Q- 2
"	Travel Advisors of Sunnyvale	$ 12,638.12	.91	Q- 3
"	Snyder, R.	$ 12,000.00	4.00	A- 2
"	Diashyn, M.	$ 11,793.75	1.27	B-14 (1)
"	Heinrichs, Abe	$ 12,207.50	.95	Q- 2
"	Hahn, Maurice	$ 8,000.00	2.00	A- 4
"	Fife, T.	$ 12,000.00	4.00	A- 2
"	Golder, F. B.	$ 7,000.00	2.00	A- 3
		12,638.12	.91	Q- 3
"	Sherrington, A.	$ 5,000.00	2.00	A- 1
"	Buckley, R. E.	$ 12,638.12	.91	Q- 3
10/19/71	Baum, Dennis	$ 11,793.75	1.27	B-14 (1)
"	Zink, John	$ 14,649.00	1.14	Q- 2
"	Elloway, John	$ 12,638.12	.91	Q- 3
"	Bodin, Arthur	$ 13,000.00	1.00	A- 1 Resale
"	Keim, Dewey	$ 12,207.50	.95	Q- 2
"	Fisher, Wm.	$ 24,415.00	1.90	Q- 2
"	Roy, Robert	$ 12,638.12	.91	Q- 3

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
10/19/71	Freynik, Elizabeth	$ 5,600.00	1.60	A- 3
"	Kanemoto, Ron	$ 11,793.75	1.27	B-14 (1)
"	Elgin, Roger	$ 12,638.12	.91	Q- 3
"	Eggers, David	$ 24,415.00	1.90	Q- 2
"	Carli, Arthur	$ 24,000.00	4.00	Q- 1 (2)
"	Coulson, H. G.	$ 12,000.00	2.00	Q- 1 (2)
		12,638.12	.91	Q- 3
"	Sarto, Joseph	$ 14,649.00	1.14	Q- 2
"	Coon, Paul	$ 12,207.50	.95	Q- 2
"	Smith, David	$ 8,400.00	2.40	A- 3
"	Kuns, Warren	$ 18,870.00	2.04	B-14 (1)
		7,500.00	3.00	A- 1
"	Ediger, John	$ 12,207.50	.95	Q- 2
"	Johnson, Keith	$ 20,000.00	4.00	Q- 1 (1)
		20,000.00	4.00	Q- 1 (1)
		11,100.00	3.00	A- 3 Resale
"	Staffeld, B.	$ 16,800.00	2.80	Q- 1 (2)
"	Petricone, A.	$ 12,638.12	.91	Q- 3
"	Herndon, C.	$ 12,600.00	3.60	A- 3
		7,200.00	3.60	Q- 1 (1)
"	Bush/Barnes	$ 67,128.75	6.88	B-14 (2)
"	De Somer, Russell	$ 19,532.00	1.52	Q- 2
"	Bertron, Robert	$ 14,152.50	1.53	B-14 (1)
"	Candiliere, J.	$ 8,000.00	2.00	A- 4
"	Tiret, Horace & Elsie	$ 12,207.50	.95	Q- 2
		14,917.50	1.53	B-14 (2)
"	Starnes, Les	$ 9,945.00	1.02	B-14 (2)
"	Muhlhauser, H. J.	$ 12,500.00	5.00	A- 1
		12,000.00	2.40	Q- 1 (1)
"	Gilson, Edwin	$ 12,207.50	.95	Q- 2
"	Briggs, Claude	$ 9,766.00	.76	Q- 2
"	Bruce, Michael	$ 12,431.25	1.27	B-14 (2)
"	Heersema, P. H.	$ 5,055.25	.37	Q- 3
		12,638.12	.91	Q- 3

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
10/19/71	Koch, Monica	$ 6,400.00	1.60	A- 4
"	Svilich, G. A.	$ 21,600.00	3.60	Q- 1 (2)
10/20/71	Harris, Joyce	$ 4,800.00	1.60	A- 2
"	Kraemer, Robert	$ 4,800.00	1.20	A- 4
"	Halter, Frank	$ 11,793.75	1.27	B-14 (1)
		12,638.12	.91	Q- 3
"	Working, John	$ 12,638.12	.91	Q- 3
"	Addicott, Warren	$ 12,638.12	.91	Q- 3
"	Sanner, Marilyn	$ 38,400.00	6.40	Q- 1 (2)
		37,740.00	4.08	B-14 (1)
"	Sequeira, M.	$ 12,431.25	1.27	B-14 (2)
"	Knutsson, K. H.	$ 12,638.12	.91	Q- 3
"	Maerkl, Florence	$ 12,207.50	.95	Q- 2
"	Joerger, Norman	$ 12,207.50	.95	Q- 2
"	Wilson, Wilbert	$ 11,793.75	1.27	B-14 (1)
"	Anderson, Charles	$ 14,649.00	1.14	Q- 2
		12,638.12	.91	Q- 3
		12,638.12	.91	Q- 3
"	Crook Family	$ 12,638.12	.91	Q- 3
"	Cusick, Paul	$ 10,000.00	4.00	A- 1
"	Hawley, Glenn	$ 12,431.25	1.27	B-14 (2)
		11,793.75	1.27	B-14 (1)
"	Kilduff, Edward	$ 24,000.00	6.00	A- 4
		4,800.00	1.20	A- 4 Resale
		12,000.00	2.40	Q- 1 (1)
"	Perry, Bess	$ 12,638.12	.91	Q- 3
"	Sera, Hiram	$ 12,638.12	.91	Q- 3
"	Sullivan, John	$ 12,000.00	4.00	A- 2
"	Gahafer, Thomas	$ 14,649.00	1.14	Q- 2
"	Hickox, Gundi	$ 12,500.00	5.00	A- 1
"	Ladd, Dean	$ 11,793.75	1.27	B-14 (1)
"	Davis, Russell	$ 12,600.00	3.60	A- 3
"	Ross, Arthur	$ 12,638.12	.91	Q- 3
"	Kalinin, Lucille	$ 12,600.00	3.60	A- 3
"	Lundquist, B. J.	$ 12,207.50	.95	Q- 2

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
10/21/71	Johnson, Terry	$ 12,638.12	.91	Q- 3
"	Bigden/Caulkettan	$ 14,649.00	1.14	Q- 2
"	Latshaw, Donald	$ 4,800.00	1.60	A- 2
"	Pospiech, F.	$ 7,076.25	.77	B-14 (1)
"	Gyuling, Eugene	$ 4,800.00	1.20	A- 4
"	Woodbridge, J.	$ 12,800.00	3.20	A- 4
"	Kintzinger, Rosemary	$ 7,000.00	2.00	A- 3
"	Katekakru, J.	$ 12,638.12	.91	Q- 3
"	Schwarzbach, M. H.	$ 14,649.00	1.14	Q- 2
"	Kallman, Gary	$ 7,200.00	1.20	Q- 1 (2)
"	Born, Fred	$ 10,000.00	4.00	A- 1
		12,000.00	2.00	Q- 1 (2)
		15,165.75	1.10	Q- 3
		4,000.00	.80	Q- 1 (1)
"	Michel, John	$ 15,165.75	1.10	Q- 3
10/22/71	Selji & Bond	$ 29,835.00	3.06	B-14 (2)
"	Worden, Archie	$ 12,000.00	2.00	Q- 1 (2)
"	Soenen, Kenneth	$ 12,000.00	2.40	Q- 1 (1)
"	Beedle, Wm.	$ 12,207.50	.95	Q- 2
"	Haman, L. A.	$ 12,000.00	2.40	Q- 1 (1)
"	Lee, Donald	$ 18,870.00	2.04	B-14 (1)
"	Gibson, Jerry	$ 8,000.00	1.60	Q- 1 (1)
"	Eastman, L.	$ 12,638.12	.91	Q- 3
"	Corrinet, John	$ 2,400.00	.80	A- 2
		14,000.00	2.80	Q- 1 (1)
		23,587.50	2.55	B-14 (1)
		8,000.00	1.60	Q- 1 Resale
10/23/71	Ullman, A.	$ 9,945.00	1.02	B-14 (2)
"	Harward, P. C.	$ 7,000.00	2.00	A- 3
"	Williams, J. G.	$ 7,000.00	2.00	A- 3
"	Wilkey, P.	$ 4,883.00	.38	Q- 2
"	Flocks, Milton	$ 12,638.12	.91	Q- 3
"	White, Richard	$ 7,200.00	1.20	Q- 1 (2)

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
10/23/71	Hokkala, Vance	$ 2,400.00	.80	A- 2
"	Sharpe, Vernon	$ 12,207.50	.95	Q- 2
		12,207.50	.95	Q- 2
"	Frankel, C. W.	$ 12,207.50	.95	Q- 2
		12,638.12	.91	Q- 3
"	Schroeder, R. A. Note: L. M. Taylor, Adm. of Schroeder Estate. Schroeder deceased	$ 16,511.25	1.78	B-14 (1)
"	Hawley, Fred	$ 12,431.25	1.27	B-14 (2)
"	Dunham, O. C.	$ 4,800.00	1.60	A- 2
Note: No mail delivered 10/25/71 Veteran's Day				
10/26/71	Francik, M. E.	$ 12,207.50	.95	Q- 2
"	Watanabe, Y.	$ 12,638.12	.91	Q- 3
"	Eng, Howard	$ 12,000.00	2.40	Q- 1 (1)
"	Murphy, Wm.	$ 7,200.00	2.40	A- 2
"	Alden, John C.	$ 11,793.75	1.27	B-14 (1)
"	Wright, M.	$ 12,638.12	.91	Q- 3
"	Lee, Thomas	$ 12,207.50	.95	Q- 2
"	Haberl, Robert	$ 12,638.12	.91	Q- 3
"	Brandt, Arthur	$ 7,500.00	3.00	A- 1
		9,435.00	1.02	B-14 (1)
"	Abler, L. A.	$ 9,766.00	.76	Q- 2
		16,800.00	2.80	Q- 1 (2)
"	Hawley, Gary	$ 9,766.00	.76	Q- 2
"	Maule, Elroy	$ 12,638.12	.91	Q- 3
"	Sather, Paul	$ 12,638.12	.91	Q- 3
"	Noaker, L. J.	$ 50,552.50	3.65	Q- 3
"	Dunlop, M. G.	$ 44,752.50	4.59	B-14 (2)
"	Jones, David	$ 12,638.12	.91	Q- 3

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
10/26/71	Coming, B. K.	$ 12,276.25	1.83	Q- 3
"	Gonsalves, F. J.	$ 26,000.00	2.00	A- 4 Resale
"	Schaefle, W.	$ 8,000.00	1.60	Q- 1 (1)
"	Ives, Travis	$ 9,435.00	1.02	B-14 (1)
"	Holt, Gary	$ 12,000.00	2.40	Q- 1 (1)
		11,793.75	1.27	B-14 (1)
10/27/71	Chandler, Bill	$ 12,638.12	.91	Q- 3
"	Burnett, M. G.	$ 12,207.50	.95	Q- 2
"	White, John D.	$ 12,207.50	.95	Q- 2
"	Fiscus, D.	$ 12,638.12	.91	Q- 3
"	Gerlich, H. W.	$ 12,638.12	.91	Q- 3
"	Wise, Majorie	$ 12,207.50	.95	Q- 2
"	Shaffer, Glenn	$ 12,207.50	.95	Q- 2
"	Millard, John	$ 7,500.00	3.00	A- 1
		2,500.00	1.00	A- 1
"	Jansen, John	$ 4,800.00	1.20	A- 4
"	Crowell, Eldy	$ 12,000.00	2.00	Q- 1 (2)
"	Angell, Robert	$ 16,000.00	3.20	Q- 1 (1)
"	Townsend, Lois	$ 12,000.00	2.00	Q- 1 (2)
"	Bace/Wightman	$ 12,638.12	.91	Q- 3
"	Tyson, C.	$ 11,793.75	1.27	B-14 (1)
10/28/71	Cherry/Boggs	$ 12,638.12	.91	Q- 3
"	Lokker, Eldred	$ 3,200.00	.80	A- 4
		6,000.00	1.20	Q- 1 (1)
"	Russell, Jon	$ 12,207.50	.95	Q- 2
"	Sunset Ltd.	$ 14,649.00	1.14	Q- 2
"	Rijnholt, W.	$ 7,200.00	1.20	A- 4
"	Pierce, W.	$ 12,638.12	.91	Q- 3
"	Ellis, Ethel	$ 12,000.00	2.00	Q- 1 (2)
		14,000.00	4.00	A- 3
"	Strain, S. K.	$ 12,207.50	.95	Q- 2
"	Brotherton, John	$ 4,717.50	.51	B-14 (1)
"	Fibel, Adolph	$ 4,000.00	.80	Q- 1 (1)

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
10/29/71	Skeggs, George	$ 7,200.00	1.20	Q- 1 (2)
"	Martin, Ralph	$ 14,917.50	1.53	B-14 (2)
"	Wilson, Marilyn	$ 11,793.75	1.27	B-14 (1)
"	Teasdale, Joan	$ 4,800.00	1.60	A- 2
"	Herrero, J.	$ 12,638.12	.91	Q- 3
		7,582.88	.55	Q- 3
10/30/71	Derr, Charles	$ 12,000.00	2.00	Q- 1 (2)
"	Kitchel, J. D.	$ 22,748.63	1.64	Q- 3
"	Lui, Lambert	$ 16,000.00	3.20	Q- 1 (1)
"	Genezi, Victor	$ 12,638.12	.91	Q- 3
"	Anderson, M.	$ 9,766.00	.76	Q- 2
11/ 1/71	Hanson, Chester	$ 12,638.12	.91	Q- 3
"	Nix, James	$ 14,152.50	1.53	B-14 (1)
"	Robertson, John	$ 5,600.00	1.60	A- 3
"	Jones, David M.	$ 12,638.12	.91	Q- 3
"	Jones/Weaver	$ 12,638.12	.91	Q- 3
11/ 2/71	Tiret, Jeff & Gloria	$ 12,207.50	.95	Q- 2
"	Tiret, Steven			
(11/3/71)	Tiret, Daniel			
	Parker, Marlin			
	Parker, Sharon			
11/ 2/71	Kihnley, N. W.	$ 9,766.00	.76	Q- 2
"	Barnes, Frank	$ 19,500.00	2.00	A- 1 Resale
"	Haneberg, Walter	$ 14,917.50	1.53	B-14 (2)
"	Mahon, Arthur	$ 11,793.75	1.27	B-14 (1)
11/ 3/71	Randall, John A.	$ 13,000.00	1.00	A- 3 Resale
		13,000.00	1.00	A- 2 Resale
"	Goff, Joseph	$ 7,200.00	2.40	A- 2
"	Edwards, Elizabeth	$ 39,780.00	4.08	B-14 (2)
"	Schassberger, A. F.	$ 9,766.00	.76	Q- 2
11/ 4/71	Coleman, William	$ 4,000.00	.80	Q- 1 (1)
"	Thomas, James R.	$ 12,000.00	2.00	Q- 1 (2)
"	Young, James W.	$ 12,638.12	.91	Q- 3
	Sub Total	$3,227,030.79	426.30	

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
		Sub total from pg. viii	Sub total from pg. viii	
		$3,227,030.79	426.30	
11/ 5/71	Whitney, Tim	$ 12,638.12	.91	
	Sub Total	$3,239,668.91	427.21	

Breakdown as of Friday, November 5, 1971

302 cards originally sent out
207 cards returned

95 cards have not been returned

The above sub totals represent:
257 sales

212 cards sent out
–207 clients

5 card difference

The 5 card difference is:

Bace/Wightman — represents one client but two cards were sent
Cherry/Boggs — represents one client but two cards sent

Tiret, Jeff & Gloria — represents one client but 4 cards sent
Tiret, Steven
Tiret, Daniel
Parker, Marlin & Sharon

cards sent above: 8
clients rep. above 3
5

RECAP: Dollar amount and acreage amount represented by each card as follows:

Date Card Received	Investor	Purchase Price	Acreage	Parcel
		S.T. $3,239,668.91	S.T. 427.21	
11/ 8/71	Trapalis, Arthur	$ 12,000.00	4.00	A- 2
"	Ghilotti, Christine	$ 14,917.50	1.53	B-14 (2)
"	Moreno, John	$ 12,638.12	.91	Q- 3
11/ 9/71	Carpenter, E. T.	$ 12,207.50	.95	Q- 2
11/10/71	No cards received			
11/11/71	Hennings, John	$ 12,800.00	2.00	A- 4
"	Hartman, S. M.	$ 14,400.00	2.40	Q- 1 (2)
11/12/71	Gravelle, Rosemary	$ 14,649.00	1.14	Q- 2
"	Adkins, William	$ 4,800.00	1.20	A- 4
	Sub Totals	$3,338,081.03	441.34	
11/15/71	Kreitas, Donald	$ 12,207.50	.95	Q- 2
11/16/71	Kellogg, Harvey	$ 12,000.00	2.00	Q- 1 (2)
11/18/71	Seybert/Keyzers	$ 12,638.12	.91	Q- 3
11/29/71	Wilhelmsson, K. E.	$ 9,945.00	1.02	B-14 (2)
		$ 11,793.75	1.27	B-14 (1)
12/ 3/71	Gillard, Fred	$ 9,766.00	.76	Q- 2
	Sub Totals	$3,406,431.40	448.25	